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No. 95-0121

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

AIRCRAFT BRAKING SYSTEMS CORPORATION,
Petitioner,

v.

LOCAL 856, INTERNATIONAL UNION UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS and AMERICAN ARBITRATION ASSOCIATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether an employer may be compelled to arbitrate a grievance with a union where the employer had implemented its final contract offer which included a grievance arbitration provision and where the parties actually arbitrated grievances and where the other conduct of both parties showed their intent to be bound by the arbitration clause.

Whether a district court may enter final judgment granting a counterclaim compelling an employer to arbitrate a grievance after a hearing on a preliminary injunction where the employer was given every opportunity to develop its position.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
REASONS TO DENY THE WRIT	6
I. THE SIXTH CIRCUIT CORRECTLY HELD THAT THE EMPLOYER SHOULD BE COMPELLED TO ARBITRATE A GRIEVANCE WHERE IT IMPLEMENTED ITS "FINAL PROPOSAL" WHICH INCLUDED A GRIEVANCE ARBITRATION PROVISION, AND WHERE THE CONDUCT OF BOTH PARTIES SHOWED THEIR INTENT TO BE BOUND BY THE ARBITRATION CLAUSE	6
II. THE SIXTH CIRCUIT PROPERLY HELD THAT THE DISTRICT COURT MAY ENTER FINAL JUDGMENT GRANTING A COUNTERCLAIM COMPELLING AN EMPLOYER TO ARBITRATE A GRIEVANCE WHEN AT THE HEARING ON A PRELIMINARY INJUNCTION THE EMPLOYER WAS GIVEN EVERY OPPORTUNITY TO DEVELOP ITS POSITION	13
CONCLUSION	17

TABLE OF AUTHORITIES

Cases: Page

Fenstermacher v. Philadelphia National Bank, 493 F.2d 333 (3d Cir. 1974) 14, 15
Gateway Coal Co. v. The Mine Workers, 414 U.S. 368 (1974) 8, 9
International Union, United Mineworkers v. Big Horn Goal Co., 916 F.2d 1499 (10th Cir. 1990), *cert. denied*, 502 U.S. 1095 (1992) 11, 12
K-Mart Corp. v. Oriental Plaza, Inc., 875 F.2d 907 (1st Cir. 1989) 15
Litton Financial Printing Division v. NLRB, 501 U.S. 190 (1991) 9
Steelworkers v. Warrior Navigation Co., 363 U.S. 574 (1960) 7, 8
Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) 7, 8
United Bhd. of Carpenters and Joiners of America, Dresden Local No. 267 v. Ohio Carpenters Health and Welfare Fund, 926 F.2d 550 (6th Cir. 1991) 13, 15, 16
United Food and Commercial Workers Int'l Union, AFL-CIO, Local 7 v. Gold Star Sausage Co., 897 F.2d 1022 (10th Cir. 1990) 11, 12
United Paper Workers Int'l Union v. Int'l Paper Co., 920 F.2d 852 (11th Cir. 1991) 10, 11
University of Texas v. Camenisch, 451 U.S. 390 (1981) 13
Wolfahrt v. Memorial Medical Center, 658 F.2d 416 (5th Cir. 1981) 13

Statutes and Rules:

29 U.S.C. 185 ..... 6, 7, 8
Fed. R. Civ. P. 65(a)(2) 5, 13, 14

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BRIEF IN OPPOSITION

Respondent Local 856, International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW, respectfully requests that this Court deny the petition for *writ of certiorari* which seeks review of the Sixth Circuit's opinion below. That opinion is unreported, but is reprinted in the Petition for Certiorari at Appendix A.

STATEMENT OF THE CASE

This case involves a labor dispute between Petitioner Aircraft Braking Systems Corporation (hereafter ABS or the Company) and Respondent International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW, and its Local 856 (hereafter UAW or Union) over the Company's refusal to arbitrate a grievance over its failure to pay annual bonuses.

The parties' previous labor agreement expired; when the parties were unable to reach agreement on a successor contract, the Company implemented its "final offer" which contained, among other items, a revised arbitration clause, a no-strike clause and the promise of annual bonuses. In response, the UAW members continued to work under the terms of the Company's Final Proposal, and the Company paid the wages and benefits pursuant to that Final Proposal, but it ultimately did not pay a promised lump sum bonus of $800. The dispute here arose over the Company's refusal to pay that annual bonus.

The terms of the Company's implemented offer incorporated by reference the grievance and arbitration provisions of the expired contract, with an express proposal to modify those provisions by requiring the parties to use the American Arbitration Association rather than a permanent panel, as was the practice in the old contract.

The Company's Human Resources Director admitted at the hearing in this matter that the Company did in fact implement the AAA arbitration procedure in the Final Proposal. Except for the change to AAA, the grievance procedure from the old contract carried over in all respects into the implemented Final Proposal.

Moreover, at hearing, the Company proffered as a hearing exhibit its own document evidencing the integration of the carried-over contract terms, along with the changes, which constituted the "complete" implemented

agreement. This document, called the "Rough Draft," notably contains a "no-strike" clause and the arbitration clause.

Further compelling evidence of the existence of an agreement to arbitrate as the *quid pro quo* for a no-strike pledge appeared in a letter dated August 16, 1991, wherein the Company notified the Union that it would enforce the no-strike clause through arbitration.

During the time after the labor contract expired, there is no dispute that both Aircraft Braking and the UAW recognized and honored the terms of the implemented offer. The UAW did not strike and Aircraft Braking paid wages and benefits according to its Final Proposal until it refused to pay the annual $800 bonus.

There is likewise no dispute that the parties utilized the revised arbitration procedure, without incident, during the two-year period between August 10, 1991 and the date of the court hearing in April 1993. The Company admitted that it arbitrated or used the assistance of the arbitrator to resolve 31 disciplinary grievances that arose during the hiatus period. Three other cases were scheduled for arbitration on April 29 and April 30, 1993, the days immediately following the hearing.

In an unrelated administrative proceeding before the National Labor Relations Board, the Company admitted that it had in effect an arbitration clause and that it considered itself bound by the arbitration clause. As a result, the NLRB deferred a pending UAW unfair labor practice charge to arbitration.

After ABS refused to pay the $800 bonus, the Union filed a grevance protesting the refusal to pay. A grievance was defined by the parties to include any claim "in connection with wages and rates of pay." ABS does not contest that the grievance falls within the scope of that definition.

The Company processed the grievance beyond Step Three of the procedure, just short of arbitration. The UAW timely demanded arbitration and Aircraft Braking agreed the grievance was certified for arbitration.

However, when the scheduled May 1993 arbitration hearing date drew near, ABS departed from its pattern of arbitrating grievances and instead, inexplicably filed this action, seeking to enjoin the arbitration.

In its Complaint, the Company sought injunctive relief, a declaratory judgment, and an order staying the arbitration of the pending grievance involving the wage bonus dispute. The Union filed an Answer and Counterclaim to Compel Arbitration. A hearing was then held on the Company motion for preliminary injunction, and it had the opportunity to fully litigate its case; the Union opposed the preliminary injunction and adduced evidence by way of the testimony of union witnesses and the cross-examination of the Company witness.

At the close of the hearing, Petitioner's counsel requested the opportunity to submit post-hearing briefs in opposition to the Union's counterclaim to compel arbitration. The district court granted the request and invited the parties to submit simultaneous briefs. Based on the evidence adduced at hearing, to conform the pleadings to the proof presented, the Union filed a combined "Supplemental Post-Hearing Brief and Motion for Judgment on the Counterclaim." ABS then moved the court to grant both a preliminary and permanent injunction "based upon the record."

The district court denied the Company's application for a preliminary injunction and granted the Union judgment on the counterclaim, ordering the Company to submit the bonus grievance to binding arbitration. The court made extensive factual findings, noting that "every tangible indicia of the intent of the parties shows that both sides believed and behaved according to the view that a

grievance-arbitration agreement was in force."[1] (See Petition, App. B, p. 36a.)

Following ABS's appeal, the Sixth Circuit concluded that, "[T]he district court's findings that the actions of the Union demonstrated acceptance of ABS's 'Final Proposal,' namely, an implied interim contract containing an agreement to arbitrate was not clearly erroneous, and the district court properly applied the law to the facts of this case." (See Petition, App. A, p. 25a.)

Furthermore, as to ABS's claim that Fed. R. Civ. P. 65(a)(2) was not complied with when the district court consolidated the hearing on the motion for a preliminary injunction with the merits, the Circuit observed that, "ABS was not prejudiced by the district court's failure to give notice. . . ." (See Petition, App. A, p. 29a.)

In its petition, ABS argues that it cannot be compelled to arbitrate a grievance even where its final proposal contained an arbitration clause and where the conduct of both parties was consistent with an interim agreement. ABS further argues that before the Sixth Circuit it identified new evidence that it wished to produce before the district court and therefore it was prejudiced by the court's consolidation.

None of ABS's arguments has merit and the Petition should be dismissed.

---

[1] Later, the underlying grievance was arbitrated and the arbitrator issued an award in favor of the Union. ABS then filed a second lawsuit to vacate the arbitration award.

On June 1, 1993, ABS appealed the District Court's order compelling arbitration. Subsequently, on January 8, 1994, ABS filed a motion with the Sixth Circuit to remand the appeal to the district court, for consolidation and trial with the lawsuit to vacate the arbitration award. ABS's theory was that the district court's Order of May 14, 1993 was not final and appealable because ABS had not been afforded the chance to "fully litigate."

On March 7, 1994, the Sixth Circuit rejected that contention and denied ABS' motion to remand the appeal. (See Petition, App. A, p. 13a n.2.)

REASONS TO DENY THE WRIT

I. THE SIXTH CIRCUIT CORRECTLY HELD THAT THE EMPLOYER SHOULD BE COMPELLED TO ARBITRATE A GRIEVANCE WHERE IT IMPLEMENTED ITS "FINAL PROPOSAL" WHICH INCLUDED A GRIEVANCE ARBITRATION PROVISION, AND WHERE THE CONDUCT OF BOTH PARTIES SHOWED THEIR INTENT TO BE BOUND BY THE ARBITRATION CLAUSE.

The Court should deny the writ because the Sixth Circuit properly affirmed the findings of the trial court which concluded that the Company proffered a grievance and arbitration clause to the Union, the Union accepted the Company's offer and did not strike, the parties actually arbitrated other disputes between them and then the Company unjustifiably refused to arbitrate the grievance over the disputed bonuses. The Sixth Circuit's opinion in a factually specific dispute is consistent with both historic and recent precedent of this Court and there is no dispute among the circuits.

ABS urges the Court to grant certiorari by asserting that the Sixth Circuit, by concluding that the parties had reached an "implied interim agreement," put itself in conflict with this Court's opinions. (See Petition, at 10-11, 14.) ABS asserts that the Sixth Circuit's decision compels ABS to arbitrate the dispute "solely by operation of law." (Petition at 14.) ABS is incorrect.

This Court has long encouraged the use of the arbitration process to resolve disputes in labor management relations. Specifically, this Court has observed as follows:

> [T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government.
>
> * * * *
>
> The Congress, however, has by § 301 of the Labor Management Relations Act, assigned the courts the

> duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. Yet, to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or agreed to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.
>
> *Steelworkers v. Warrior Navigation Co.*, 363 U.S. 574, 581-3 (1960).

Furthermore, this Court has also observed, "Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike." *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 455 (1957).

Here, as the Court of Appeals observed, the district court made detailed findings and concluded as follows:

> Quite simply, every tangible indicia of the intent of the parties shows that both sides believed and behaved according to the view that a grievance-arbitration agreement was in force between the parties. It is impossible for this court to conclude otherwise because the court is necessarily constrained by the relevant facts and applicable law.
>
> Plaintiff's decision to unilaterally implement a contract is plainly an offer of "interim" employment. No other legal significance can be attached to the August 10, 1991 letter. By its terms, that letter sought neither ratification nor reply by the union.

> To the contrary, acceptance of such an offer is manifested by continuing performance. The unilateral offer contained as one of its terms an agreement to arbitrate grievances. If accepted, plaintiff can no more renege on the promise to arbitrate than it could decide to reduce wage scales or eliminate promised health benefits after work was performed.
>
> Plaintiff's unilateral offer for interim employment was accepted. Plaintiff's cross-examination of defendant's president, Don Hurr, clearly established the fact that the union has agreed to comply with the terms of interim employment while continuing to seek a more advantageous permanent agreement. Mr. Hurr even agreed with plaintiff that the no-strike clause referenced in the August 16, 1991 letter was implemented. (T. at 66.) Most telling of all, the employees have continued to work for over 20 months under the imposed terms without violation of the no-strike clause. (See Petition, App. B, p. 37a-38a.)

Thus the district court and the Court of Appeals concluded that the unique evidence of this case demonstrated that ABS offered the grievance and arbitration language to the Union, the Union accepted the proposal by not striking and the parties conducted themselves in a manner which clearly demonstrated that ABS intended to be bound by its offer to resolve any dispute by binding arbitration.

Thus the Sixth Circuit has clearly followed this Court's dictates as reflected in the *Steelworker's* trilogy and in *Lincoln Mills* to the effect that the Congress in § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 ("LMRA"), was encouraging arbitration, that doubts should be resolved in favor of coverage, and that there is normally a link between an arbitration provision and a no-strike clause.

Petitioner specifically asserts that the Sixth Circuit's opinion puts itself in conflict with *Gateway Coal Co. v.*

The Mine Workers, 414 U.S. 368 (1974) and *Litton Financial Printing Division v. NLRB*, 501 U.S. 190 (1991). (*See* Petition at 10, 11, and 14.) Again the Petitioner is in error.

In *Gateway Coal Co.*, this Court, citing the *Steelworkers* trilogy again enunciated that there is a "presumption of arbitrability for labor disputes" which "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Id.* at 377-378. This Court also observed again that an arbitration agreement is generally linked with a no-strike obligation and absent an agreement to the contrary, "the agreement to arbitrate and the duty not to strike should be construed as having coterminous application." *Id.* at 382.

This Court then concluded that it was proper for the district court to enjoin the union from striking and for it to compel the union and the company to arbitrate the underlying dispute. *Id.* at 387-388. The Circuit Court's opinion in the instant case is entirely consistent with *Gateway Coal Co.* because the Sixth Circuit concluded that the Union manifested its acceptance of the Employer's offer of a grievance and arbitration procedure by continuing to work. (See Petition, App. A, p. 25a.)

Nor does this Court's 1991 opinion in *Litton* conflict with the Court of Appeals decision. In *Litton*, this Court merely concluded that after the termination of a collective bargaining agreement this Court would not impose a statutory duty to arbitrate post-expiration disputes. *Litton*, 501 U.S. at 205-207. In *Litton*, the employer did not offer, post-expiration, a final proposal that included a grievance and arbitration clause and a no-strike clause. Thus the circumstances of *Litton* are factually distinguishable from those raised in the instant case.

The Petitioner offers no compelling reasons why the Court should review the area that it recently addressed in *Litton*. Petitioner argues that its petition should be

granted because there will be uncertainty over what constitutes an interim agreement. The Respondent disagrees because the facts and circumstances here are unique. To the extent that a rule may be drawn from this case at all, it provides that if an employer offers a grievance arbitration clause which includes a no-strike clause and the Union does not strike and the parties otherwise act in a way consistent with an offer and an acceptance, the parties are going to be bound by the arbitration agreement.

ABS next argues that it "is bound by the interim implied agreement to arbitrate forever." (Petition at 15-16.) The Sixth Circuit has already addressed this argument and dismissed it thusly, "A labor contract of indefinite duration or one that does not specify a time or manner of termination is terminable at the will of either party upon reasonable notice to the other party." (See Petition, App. A, p. 25-26a n.4).)

ABS then asserts that if the Union chooses to strike rather than arbitrate a dispute, the Company would not be entitled to injunctive relief against the strike "as it is a party only to an interim implied agreement and not a collective bargaining agreement." (Petition at 16.)

Essentially the Employer is complaining that by agreeing to an interim agreement it does not achieve the full benfits of a collective bargaining agreement, but of course neither does the Union which is forced either to work under conditions that it has not agreed to or to strike. Furthermore, the Employer created its own problem. It did not have to offer a grievance and arbitration clause, it did not have to impose its final offer and it should not be able to complain that it is being treated unfairly because it is being forced to honor its promises.

Finally the Petitioner argues that the Sixth Circuit in this case and the Eleventh Circuit as a result of its decision in *United Paper Workers Int'l Union vs. Int'l Paper Co.*, 920 F.2d 852 (11th Cir. 1991), are at odds with the

Tenth Circuit's opinions in *United Food and Commercial Workers Int'l Union, AFL-CIO, Local 7 vs. Gold Star Sausage Co.*, 897 F.2d 1022 (10th Cir. 1990) and *International Union, United Mineworkers vs. Big Horn Coal Co.*, 916 F.2d 1499 (10th Cir. 1990), *cert. denied*, 502 U.S. 1095 (1992). Again the Petitioner is in error, there is no conflict.

The Tenth Circuit's opinions do not conflict because as the Sixth Circuit observed by quoting the Eleventh Circuit in *United Paper Workers*, "the *Gold Star* court made clear . . . that 'the Union does not even allege that the Company's last offer is, in some sense, a contract between the parties, much less point to any facts in the record that might support such an assertion." (Petition, App. A, p. 20, quoting *United Paper Workers*, 920 F.2d at 858.) The Sixth Circuit went on to favorably quote the Eleventh Circuit as follows:

> [T]he Tenth Circuit opinions can be cited for the proposition that such additional evidence of union acceptance does establish an interim contract created by an implemented final offer:
>
> > "Employer implementation of a last and final offer is, by itself, insufficient to invoke jurisdiction absent some manifestation of acceptance of the offer sufficient to create a contract. . . . The contract between the parties required for jurisdiction need not be a written, signed collecitve-bargaining agreement, but may exist as any informal agreement between the parties significant to the maintenance of labor peace between them. It suffices that the parties' intent to abide by the agreed-upon provisions of any such informal agreement is in some manner manifest."
>
> (Petition, App. A, p. 20-21a citing *Big Horn*, at 1501-1502 (emphasis added) (citing *Gold Star*, 897 F.2d at 1026). . . .)

Furthermore, *Gold Star* and *Big Horn* are both cases which are markedly different from the facts here. In

Gold Star, the Union filed grievances claiming that the company's actions violated the *expired* collective bargaining agreement. *Gold Star, supra,* at 1023. On appeal, the Union argued that any dispute that would have been arbitrable under the expired agreement is arbitrable post-termination absent a clear indication that post-contract arbitration was not intended. *Id.* at 1024. The Court rejected such an approach.

Here, however, the Court of Appeals concluded that the parties clearly intended by their deeds to agree to arbitrate cases post-termination, which is dramatically different from the circumstances in *Gold Star*.

In *Big Horn Coal Co.*, the contract had expired, the company implemented its last offer which included a grievance and arbitration clause, the union initially continued to work, but then commenced a strike. Subsequently, the union unconditionally returned to work and the company alleged that 18 employees were being terminated for picket line misconduct and then refused to arbitrate the grievance filed by the union. *Big Horn Coal Co.*, 916 F.2d at 1501.

Big Horn Coal Co. is clearly distinguishable from the instant case because the grievance arose after the union had struck the facility and thus, after it had clearly rejected the employer's interim contract by engaging in a work stoppage. Here the underlying grievance arose during the time period in which the Union was continuing to work. Thus there is no conflict between the Circuits as alleged by the Petitioner.

It therefore becomes clear that the Petition should be denied because the Sixth Circuit's opinion is consistent with prior opinions of this Court and there is no conflict among the circuits. Furthermore, a denial of the Petition encourages the long-recognized policy of encouraging the arbitration of disputes where the parties have agreed to do so.

II. THE SIXTH CIRCUIT PROPERLY HELD THAT THE DISTRICT COURT MAY ENTER FINAL JUDGMENT GRANTING A COUNTERCLAIM COMPELLING AN EMPLOYER TO ARBITRATE A GRIEVANCE WHEN AT THE HEARING ON A PRELIMINARY INJUNCTION THE EMPLOYER WAS GIVEN EVERY OPPORTUNITY TO DEVELOP ITS POSITION.

Petitioner claims that it was prejudiced when the district court allegedly failed to notify the parties of its intention to consolidate the trial on the merits with the preliminary injunction hearing. (Petition, at 17.) The writ should be denied because the Sixth Circuit has already determined the Petitioner was given every opportunity to develop its position below and thus suffered no harm.

This Court has stated that the purpose of the notice provision of (Rule 65(a)(2) is to provide the parties of a consolidated action with "a full opportunity to present their respective cases." *University of Texas v. Camenisch,* 451 U.S. 390, 395 (1981). In keeping with this purpose, Petitioner must demonstrate that the failure to notify prejudiced its case and did not merely constitute harmless error. *Wolfahrt v. Memorial Medical Center,* 658 F.2d 416, 418 (5th Cir. 1981); *United Bhd. of Carpenters and Joiners of America, Dresden Local No. 267 v. Ohio Carpenters Health and Welfare Fund,* 926 F.2d 550, 558 (6th Cir. 1991).

The trial court's failure to notify Petitioner of its decision to enter final judgment did not prejudice Petitioner because it had the opportunity to defend the counterclaim fully. Petitioner cannot claim surprise because the record clearly demonstrates that it had the opportunity to answer the legal arguments set forth in the counterclaim. At the close of the hearing, Petitioner's counsel asked for and received the opportunity to submit post-hearing briefs on

the counterclaim.[2] Subsequently, Petitioner filed its Answer to the Counterclaim on May 6, 1993, and its Post-Hearing Reply Memorandum on May 5, 1993.

Moreover, the Court's one week deadline for submitting post-hearing briefs did not cause Petitioner undue prejudice. The Court shortened its briefing schedule to accommodate counsel for Petitioner.

Furthermore, the trial court's failure to give timely notice did not prejudice Petitioner because Petitioner's conduct after the preliminary injunction hearing manifested its satisfaction with the record. Petitioner indicated its satisfaction in two ways. First, its post-hearing reply memorandum sought the court's final ruling on both the preliminary and permanent injunction claims "based upon the record." In *Fenstermacher v. Philadelphia National Bank*, 493 F.2d 333 (3d Cir. 1974), the Third Circuit stated that submission of a brief seeking a final adjudication on the merits after a 65(a)(2) consolidation prevented a party from later claiming that notice of the consolidation was not timely.[3] (*Id.* at 337.)

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[2] The colloquy proceeded as follows:

> THE COURT: Do I have all of your brief papers that I will need? Do you wish to submit any more based on what you have heard?
>
> MS. MACKENZIE: Your Honor, if I might, *we only received the Defendant's response to our papers this morning. And I would therefore request that we be permitted to submit post hearing briefs, if your Honor wishes us to clarify further the issues that are raised here.*
>
> THE COURT: May I suggest whatever else you wish to submit, you submit within one week simultaneously if you will. The deadlines here are short but I understand counsel will not be totally available in the next month or so and I would like to get it done for you.

[3] Although there was evidence in *Fenstermacher* that both parties had agreed that all relevant evidence was presented at the preliminary injunction hearing, the court made it clear that "[e]ven had there been no agreement that all the evidence was presented," the

Just as in *Fenstermacher*, Petitioner in this case manifested its satisfaction with the record as to all the issues presented, both in its claims and Respondent's counterclaims, by filing its Answer to the Counterclaim and its post-hearing reply memorandum. Nowhere in its reply memorandum does Petitioner argue that the evidence presented at the preliminary injunction is insufficient to address fully its arguments.[4]

Second, Petitioner manifested its satisfaction with the record, in its brief on appeal, by "reargu[ing] the same issue in the same way rely[ing] on the same evidence." (See Petition, App. A, p. 28a.) In *United Bhd. of Carpenters and Joiners of America, Dresden Local No. 267 v. Ohio Carpenters Health and Welfare Fund*, 926 F.2d 550 (6th Cir. 1991), the Sixth Circuit held that a district court's failure to notify plaintiff of its *sua sponte* motion to dismiss was harmless error because the plaintiff's memorandum in opposition was an "effective response" to the motion and, on appeal, the plaintiff "reargued the same issues in the same way, thereby giving rise to a very strong inference that the legal position taken in the memorandum in opposition . . . reflected the [plaintiff's] mature position." *Id.* at 558. In addition, the Sixth Circuit emphasized that the plaintiff did "not indicate what additional measures it might have taken"

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plaintiff acquiesced to the consolidation by submitting his brief. 493 F.2d at 337.

[4] In *Fenstermacher*, the Third Circuit, rather than determining whether the trial court's failure to timely notify constituted prejudicial error, held that the plaintiff waived his right to raise the issue by submitting his brief. 493 F.2d at 337. Also, in *K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907 (1st Cir. 1989), the First Circuit found that similar conduct amounted to acquiescence to the court's decision to consolidate and constituted a waiver. *Id.* at 913-914. Arguably, Petitioner, by its conduct in submitting a brief and failing to timely object to the consolidation, simply waived its right to claim that the trial court's final judgment prevented petitioner from fully presenting its case.

had the court timely notified it of its motion to dismiss. *Id.*

The Sixth Circuit decision from which this certiorari petition arises found *United Brotherhood* controlling in this instance. Like the plaintiff in *United Brotherhood,* Petitioner's arguments on appeal mirror those in its post-hearing reply memorandum—namely, that no agreement existed between the parties. These arguments reflect "its mature position." Accordingly, the trial court's failure to timely notify Petitioner constitutes harmless error that in no way diminished Petitioner's opportunity to litigate fully its case.

Finally, the trial court's failure to notify Petitioner does not prejudice Petitioner because Petitioner's "new evidence" does not alter the basis of the trial court's ruling. Petitioner now asserts that, had it been given timely notice, it "would have taken the depositions of Union representatives who are more forth-right than" Don Hurr (Reply Brief of Appellant, p. 10) and points to the testimony of Roger Bernardez, a UAW international representative present at the negotiations between Petitioner and Respondent, who testified at the arbitration hearing. (See Petition, at 18.)

As to Petitioner's first assertion, the Sixth Circuit correctly characterized it as nothing more "than a claim that if given notice of a possible adverse decision, Petitioner would have engaged in a fishing expedition for favorable evidence." (See Petition, App. A, p. 29a, n.5.) As to Petitioner's reliance on Mr. Bernardez's testimony, the Sixth Circuit correctly points out that his testimony "would not alter the outcome of the case." (App. A, 29a, n. 5.)

In concluding that an agreement to arbitrate grievances existed between Petitioner and Respondent, the trial court relied on the *conduct* of the parties. Therefore,

Bernardez's testimony that Respondent never agreed to be bound by the no-strike provision is inapposite. The trial court concluded that Respondent accepted Petitioner's offer for interim employment "by continuing performance." (See Petition, App. B, p. 37a.) More importantly, the court found "most telling" the fact that "the employees continued to work for over 20 months under the imposed terms without violation of the no-strike clause." *Id.*

Therefore, it could not be more clear that ABS's argument that it was prejudiced by the consolidation is utterly without foundation and its petition should be denied.

CONCLUSION

The petition for certiorari should therefore be denied.

Respectfully submitted,

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